2-1029

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR M. EISENBEISS, JR.,
Petitioner,

v.

JAMES HUBERT JARRELL, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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STATEMENT OF CASE

On October 31, 1979, the Petitioner, Victor M. Eisenbeiss, filed suit in the Circuit Court for Prince George's County, Maryland, against James Hubert Jarrell and Avis Rent-A-Car System, Inc. The claim was for personal injuries allegedly resulting from a motor vehicle accident involving Mr. Eisenbeiss and Mr. Jarrell, who was at the time operating a vehicle owned by Avis Rent-A-Car, Inc.

Prior to and during the course of the litigation, the parties, acting through counsel, attempted to settle the case. Finally, on February 20, 1981, three days before the scheduled trial date, the defendants accepted the plaintiff's settlement demand of Seventy-Five Thousand Dollars

($75,000.00). Accordingly, all parties released the witnesses who had previously been placed under subpoena for the scheduled trial.

Two days after the settlement agreement had been reached and confirmed, the plaintiff informed his counsel that he had changed his mind and would not honor the settlement. His counsel advised him, to no avail, that the settlement was valid and binding as a mutual agreement between the parties.

The very next day, that for which trial had been scheduled, the plaintiff and counsel for all parties appeared in the chambers of Judge Jacob S. Levin to apprise the Court of the developments of the preceding three days. Counsel for all parties reconfirmed the facts and terms of the agreed

settlement; the plaintiff, however, informed counsel and the Court that he had changed his mind and had decided that the Seventy-Five Thousand Dollar ($75,000.00) settlement, which he had previously authorized and which authorization had not, prior to acceptance, been withdrawn, was no longer enough.

Despite repeated attempts by the defendants to tender the settlement draft of Seventy-Five Thousand Dollars ($75,000.00), the plaintiff refused to accept the draft, to execute a release and to dismiss the case with prejudice. The jury trial on the matter was rescheduled for March 1, 1982.

On August 31, 1981, defendants filed a Motion to Enforce settlement. Plaintiff filed an Answer to that Motion and requested

a hearing on the Motion at the earliest possible date. Duirng this time the plaintiff retained new counsel and his earlier attorney withdrew his appearance.

On December 17, 1981 the hearing on defendants' Motion to Enforce Settlement took place before Judge Levin. Testimony was taken from the plaintiff and from the attorneys who had participated in the settlement. Judge Levin made factual findings that the settlement figure of Seventy-Five Thousand Dollars ($75,000.00) had been agreed to by the plaintiff and that the plaintiff had indeed authorized his then counsel to effect a settlement in that amount. In furtherance of these findings, Judge Levin granted the Motion to Enforce Settlement.

On January 21, 1982, plaintiff again noted a change of counsel and filed a series of motions in response to the Order enforcing settlement. Defendants opposed these several motions; the motions were given an oral hearing before Judge Levin on February 8, 1982, and all were denied.

Plaintiff subsequently appealed the Order granting defendant's Motion to Enforce Settlement. The issues he brought to Maryland's Court of Special Appeals were basically three: (1) Whether a Motion to Enforce Settlement is a legitimate procedure under Maryland law; (2) Whether Judge Levin should have recused himself from hearing the Motion to Enforce Settlement; (3) Whether Judge Levin's findings concerning the settlement were

adequately supported by the record.

Maryland's Court of Special Appeals devoted the major portion of its opinion to a procedural issue not raised by the parties and similarly not presented in the Petition for Certiorari before this Honorable Court. As to the three issues actually presented it, the Court dismissed them as follows:

(1) Propriety of Motion to Enforce Settlement -- since not raised below, the Court refused to consider the issue for the first time on appeal. The Court did, however, conclude its discussion of the issue with the following cite, "See, moreover, Eastern Environ. v. Industrial Park, 45 Md. App. 512 (1980)." Part of the holding of Eastern Environ. v. Industrial Park

is that "entry of a monetary judgment upon a motion to enforce a settlement agreement in the underlying legal action is properly within the jurisdiction of a law court." 45 Md. App. at 518. The deliberate reference by the Court of Special Appeals to that case clearly indicates that such a motion is a legitimate procedural device in the courts of Maryland.

(2) Recusal of Judge Levin -- The Court of Special Appeals again noted that no request for recusal had been made by the plaintiff below, and further stated that "from the facts presented by appellant, we see no reason whatever why [Judge Levin] should have done so. The complaint, in our judgment, is frivolous."

(3) Factual Findings of Judge Levin --

The Court of Special Appeals reviewed the record and concluded that the Court's findings were clearly supported by testimony in the record and therefore not "clearly erroneous," as would be required for reversal.

Consistent with its findings on the issues, the Court of Special Appeals affirmed the Order of the lower court which granted defendants' Motion to Enforce Settlement. Plaintiff then petitioned for a writ of certiorari to the Court of Appeals of Maryland. The petition was subsequently denied by Order of the Court of Appeals of Maryland on February 3, 1983.

On February 25, 1983, Petitioner and his counsel gave written consent for disbursement of the Seventy-Five Thousand

Dollars ($75,000.00) settlement fund which had been deposited in the Registry of the Circuit Court for Prince George's County, Maryland. Disbursement of said fund was subsequently made pursuant to a Court Order dated March 1, 1983.

ARGUMENT

The Petitioner has articulated four questions for which he asserts that certiorari should be granted by this Honorable Court. Each of these four questions was initially presented for review to Maryland's Court of Special Appeals. Each question received adequate consideration by and a rational and sound decision from the appellate body. Subsequently, each question was presented in a petition for certiorari before the Court of Appeals of

Maryland, and that Court found certiorari on the issues not warranted.

Respondents respectfully submit that the case before this Court and the four questions once again raised by Petitioner fail to present any substantial question of federal law or any other "special and important reasons" as are required by Rule 19 of the Rules of this Honorable Court for a grant of certiorari. As explained in the following argument, the facts and issues of this case are not novel; the decisions below were consistent with Maryland precedent and with case law from other jurisdictions; the arguments advanced by Petitioner neither account for nor distinguish the sound and consistent case law which accords with the decisions below in

this case. Hence, in no respect does the case at bar merit an exercise by this Court of its discretionary Writ of Certiorari.

Certiorari is a discretionary writ, the exercise of which is reserved for cases which present substantial reasons therefor. As stated by this Court in Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 and later quoted in Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion

and authority between the circuit courts of appeal."

Petitioner has raised due process and equal protection questions on each of two issues in this case: whether the motion to enforce settlement is an acceptable procedural device for disposition by a trial judge, and whether the judge in this case should have recused himself from deciding the motion to enforce settlement.

Petitioner's challenge to the motion to enforce settlement overlooks precedent in the State of Maryland which is directly on point. The 1980 case of Eastern Environ. Endeavor v. Industrial Park Authority of Calvert County, 45 Md. App. 512, 413 A.2d 1355, squarely decided that "entry of a

monetary judgment upon a motion to enforce a settlement agreement in the underlying action is properly within the jurisdiction of the law court." Id. at 518. The opinion in Eastern Environ. Endeavor also cited two previous Maryland Appellate cases in which the validity of a trial court's enforcement of a settlement was assumed without question. In Chertkof v. Harry Weiskittel Co., 251 Md. 544, 248 A.2d 373 (1968), "[t]he Court apparently saw no difficulty with the entry of a money judgment based upon a settlement agreement between the parties." (citation omitted) Eastern Environ. Endeavor, supra, at 517. In Clark v. Elza, 286 Md. 208, 406 A.2d 922 (1979), the Court of Appeals of Maryland, "while not directly address-

ing the propriety of a motion to enforce a settlement agreement in an underlying legal action, 406 A.2d at 924 n.1, did hold that a settlement agreement is an executory accord and that a plaintiff in breach of the accord could not prosecute the underlying tort action." (citation omitted) Eastern Environ. Endeavor, supra, at 517.

Maryland's acceptance of the motion to enforce settlement also finds support in case law from other jurisdictions. In Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975) (cited in both Eastern Environ. Endeavor, supra, and Clark v. Elza, supra), the Court upheld a trial court's disposition of a motion to enforce settlement despite challenges to the merger of law

and equity and claims of right to a jury determination, both issues of which have been raised herein. The Court in Warner easily disposed of those issues as follows:

> [6,7] Plaintiff has claimed a jury trial on these matters. Accord and satisfaction is a traditional affirmative defense at law apparently requiring, if demanded, a jury determination of disputed material facts. (citations omitted) But this is not a case where the defending party raises a consummated accord and satisfaction in bar. Rather the defendant seeks to block plaintiff's continuation of an original action by asking the court to specifically enforce a settlement contract which plaintiff refuses to carry out. Specific performance is an equitable proceeding. Moreover, the agreement sought to be enforced arose out of negotiations between attorneys in the midst of a trial. A judge seems better suited to assess the reasonableness of parties' conduct

> under all circumstances. We hold it within the authority of a judge[2] sitting without jury to make the necessary findings of fact and rulings.

513 F.2d at 683-4, footnote omitted. The Warner decision was recently reaffirmed by the First Circuit in Dankese v. Defense Logistics Agency, 693 F.2d 13 (1st Cir. 1982). Citing both Warner and Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197, 1200 n.10 (1969), the Court in Dankese concluded, "It is well established, therefore, that a trial court retains an inherent power to supervise and enforce settlement agreements entered into by parties to an action pending before the court." Dankese, supra, at 16.

The foregoing cases establish a solid basis for the decisions below in this case.

Petitioner, while failing to recognize the authority of these holdings, has at the same time failed to cite any case law to the contrary. His allegations of due process and equal protection violations are extremely generalized and lack any real factual support in the record. Clearly, the context of this case presents no constitutional deprivation and no unsettled issue of law in need of resolution by this Honorable Court.

Aside from the absence of a controversial or compelling issue of law in this case, certain circumstances herein render the issues raised particularly unfit or inappropriate for review. The first such circumstance, noted by the Court of Special Appeals below, is that Petitioner failed

to make timely objections at the trial stage of the proceedings. He filed an Opposition to the Motion to Enforce Settlement, as well as a Request for Hearing on same, but in said Opposition he neither objected to the procedural propriety of such a motion nor did he request a jury determination on the facts concerning the settlement. Rather, Petitioner participated fully in the hearing before Judge Levin on said motion. In failing to note timely objections to those issues, Plaintiff lost his right to appeal them. Maryland Rule 1085; Paltrow v. Paltrow, 37 Md. App. 191, 376 A.2d 1134 (1977), aff'd, 283 Md. 291, 388 A.2d 547 (1978).

Another circumstance which makes

further review in this case inappropriate is that on February 25, 1983, Petitioner and his counsel gave their written consent to disbursement of the Seventy-Five Thousant Dollar ($75,000.00) settlement sum which had previously been deposited in the Registry of the Circuit Court for Prince George's County, Maryland. The Consent Order, which was signed by Judge Levin of that Court on March 1, 1983, provided that the $75,000.00 was to be disbursed as follows:

1. Henry E. Weil, Esquire - $30,000.00.

2. Victor M. Eisenbeiss, Jr. - $22,884.47 plus 100% of accrued interest to date of disbursement.

3. Van S. Powers, Esquire - $22,115.53.

(See Appendix to this Brief). Although

Petitioner takes the position that his consent to disbursement was conditioned on a survival of his right to appeal the case, case law consistently holds that one who accepts the benefit of a judgment thereby loses his right to appeal same. Spanel v. Berkman, 171 F.2d 513, (7th Cir. 1948), cert. denied, 336 U.S. 968; In re Denney, 135 F.2d 184, (7th Cir. 1943), cert. denied, 320 U.S. 747, reh. denied, 320 U.S. 812; Finefrock v. Kenova, 37 F.2d 310 (4th Cir. 1930), and cases following. The fact of the Consent Order in this case, if not an absolute bar to further appeal, at least clouds any other issues in the case and makes it a less attractive vehicle for resolution of conflicting legal doctrines or declaration of judicial precedent.

The final circumstance which makes this an unattractive case for review is that Petitioner is challenging the opinion of a respected trial judge, as well as that of Maryland's two appellate tribunals, each of whom felt that Judge Levin bore no duty to recuse himself from hearing and deciding the Motion to Enforce Settlement. Judge Levin's own decision to hear the motion was deemed entirely proper by the Court of Special Appeals of Maryland, after a thorough and objective review of the record as a whole. The Court of Appeals of Maryland, when given the opportunity to review that determination on certiorari, declined to do so. In the interests of judicial finality and conservation of judicial resources, there is no reason why this Honorable Court

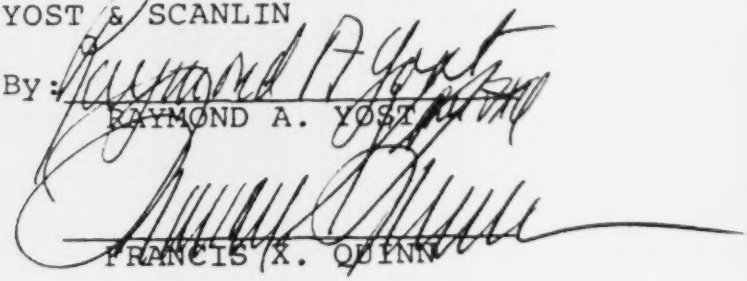
should review a charge of judicial bias which has already been objectively considered and rationally rejected by two appellate bodies.

CONCLUSION

In light of the foregoing arguments, Respondents respectfully submit that the issues raised by Petitioner do not warrant a grant of certiorari by this Honorable Court. There are no conflicting judicial doctrines at issue herein; Petitioner failed to adequately preserve for appeal several of the issues he is raising; each of the issues asserted has already received adequate review and a proper resolution; finally, Petitioner has already accepted the benefit of the settlement he is disputing. While any one of these reasons would alone justify a denial of certiorari,

their cumulative effect surely compels such a result. Accordingly, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

ANDERSON, QUINN, WYLAND,
YOST & SCANLIN

By: 
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Attorneys for
Respondents

In The

Circuit Court for Prince George's County, Maryland

Law No. 78192

Victor M. Eisenbeiss, Jr.
Plaintiff,

v.

James Hubert Jarrell, et al.,
Defendants.

CONSENT ORDER

(Filed March 1, 1983)

(Clerk of the Circuit Court for Prince George's County, Md.)

Upon consideration of the Petition to Withdraw Counsel Fees and Costs from the Registry of the Court and it appearing to the Court that the Court of Special Appeals of Maryland in an opinion filed November 4, 1982 has affirmed the findings of this Court that counsel, HENRY E. WEIL, had the requisite authority to settle the case for $75,000.00 and a petition for Writ of Certiorari to the Court of Appeals of Maryland having been denied, it is thereupon by and with the consent of the parties,

ORDERED, that the funds presently held in the Registry of this Court be, and the same are hereby to be, disbursed by the Clerk of this Court as follows:

1. *HENRY E. WEIL* — $30,000.00
2. *VICTOR M. EISENBEISS, JR.* — *$22,884.47* plus 100% of accrued interest to date of disbursement.
3. *VAN S. POWERS, ESQUIRE* — *$22,115.53.*

The disbursement of the above funds *in no way* affects the right of appeal to the Supreme Court of the United States by Victor M. Eisenbeiss, Jr. in these proceedings, and a trial, if granted by the Supreme Court of the United States, in these proceedings. Victor M. Eisenbeiss, Jr. does not concede, *in any way*, that, by the disbursement of the above funds that there was any agreement *whatsoever* between Victor M. Eisenbeiss, Jr. and Henry E. Weil to settle the above captioned matter at $75,000.00.

HENRY E. WEIL,
Petitioner,

VICTOR M. EISENBEISS, JR.,
February 25, 1983
Plaintiff,

VAN S. POWERS, ESQUIRE,
February 25, 1983,
Attorney for Plaintiff.

JACOB S. LEVIN,
Judge.

3/1/83

(Checked and Verified: McG)